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No. 90-1720

In The

Supreme Court of the United States

October Term, 1990

GROSSMONT UNION HIGH SCHOOL DISTRICT,

Petitioner,

v.

THOMAS DAVIES,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit properly conclude that, under the circumstances of this case, it offends important public interests to enforce a provision of a settlement agreement that treats political rights as economic commodities, and allows incumbents to use litigation settlements to exclude political opponents.

PARTIES TO THE PROCEEDING BELOW

Dr. Thomas Davies, respondent herein, disputes the Grossmont Union High School District's recitation of "Parties to the Proceedings Below." The school district asserts that "[t]he school district alone petitions this Honorable Court." A more accurate description is that propounded by the Ninth Circuit, "Although we have denominated the defendant in this case 'the District,' we cannot overlook the fact that the real parties in interest urging enforcement of the settlement agreement are the current members of the Board, with whose policies Dr. Davies vigorously disagrees." (Petition Appendix, at A-21.)

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BRIEF IN OPPOSITION

TO THE HONORABLE WILLIAM H. REHNQUIST, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Dr. Thomas Davies ("Dr. Davies" or "respondent") respectfully submits this Brief in Opposition to Grossmont Union High School District's (the "school district" or "petitioner") Petition for Writ of Certiorari.

PROVISION OF LAW INVOLVED

The single provision of federal law in question is U.S. Const., amend. I, which states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This litigation is the latest round in an acrimonious political dispute. For over twenty years, Nadia Davies, respondent's wife, was employed by petitioner, the school district, as a school teacher and department chairperson. (Petition Appendix, at A-6.) In the late 1980's, petitioner hired a principal who ignored state requirements for education of disadvantaged children. Mrs. Davies disagreed with the new principal's approach to those policies. The principal retaliated by transferring Mrs. Davies to another school. An employment dispute resulted.

In January 1988, after exhausting administrative remedies, respondent and his wife filed an action in the Superior Court of the State of California against petitioner and its board of trustees (the "Governing Board"). (Petition Appendix, at A-6.) The lawsuit included several causes of action on behalf of Mrs. Davies, including her assertion that the school district's actions violated 42 U.S.C. section 1983. *Ibid.* Respondent asserted only one

cause of action, for loss of consortium. *Ibid.* When petitioner removed the case to federal district court, the district court accepted jurisdiction of the section 1983 claim and remanded all other claims back to the state court, including respondent's loss of consortium claim. *Ibid.* Respondent erroneously remained a named plaintiff in the federal action, even though his only claim had been remanded to state court. *Ibid.*

In November 1988, respondent and his wife executed a settlement agreement with petitioner. *Ibid.* The agreement provided, *inter alia,* that Dr. and Mrs. Davies would dismiss the state court and federal court actions against petitioner in return for payment of $39,200. *Ibid.* As part of the settlement, Mrs. Davies, having accepted employment in a different district, resigned from her employment with the Grossmont district, and waived any claim under state worker's compensation laws. (Emergency Motion Under Circuit Rule 27-3 For a Stay Pending Appeal [hereinafter "Emergency Motion"], Ex. 3.) The settlement agreement included a full release by both respondent and Mrs. Davies of all claims against the school district. *Ibid.* The only provision of the settlement agreement at issue in this proceeding is paragraph 9, which states: "Plaintiffs each agree that neither one nor both of them will ever seek, apply for, or accept future employment, position, or office with Defendant District in any capacity."[1] *Ibid.*

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[1] At the trial court level, the school district contended that when Dr. Davies signed the settlement agreement, he knowingly and intentionally waived his right to run for a seat on the Governing Board. Now, the school district apparently concedes

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On April 11, 1989, the district court signed a "Dismissal and Release and Order Thereon." (Emergency Motion, Ex. 4.) Although the dismissal order discussed some portions of the settlement agreement, the agreement was not incorporated either by reiteration or reference. *Ibid.* The order makes no mention of paragraph 9 or its terms, and at no point intimates that the terms of the settlement agreement would be enforceable by contempt proceedings. *Ibid.* Further, the district court did not sign the settlement agreement. Dr. and Mrs. Davies then dismissed the state action. (Petition Appendix, at A-6.)

More than a year later, on August 2, 1990, Dr. Davies, having moved into the school district, publicly declared his candidacy for the Governing Board. (Petition Appendix, at A-6.) The same members of the Governing Board who had approved the settlement were still on the Board

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that at the time of the settlement, Dr. Davies did *not* contemplate that by agreeing to paragraph 9 he could be waiving his right to run for a seat on the school board (as petitioner now concedes, at that time Dr. Davies did not even live in the school district). (Petition, p. 13.) While these issues may well be important to evaluating whether Dr. Davies was intending to waive *his* rights, they have little bearing on how the settlement agreement impacts the *voters'* constitutionally protected political rights. Neither the school district nor Dr. Davies has the power, either intentionally or unwittingly, to enter into a private contract restricting the range of candidates available to the electorate. Indeed, section 29305 of the California Election Code states, in pertinent part, "A person shall not directly or through any other person advance, pay, solicit, or receive or cause to be paid or received any money or other valuable consideration . . . in order to induce a person not to become or to withdraw as a candidate for public office."

and were aware of his candidacy. (*See, e.g.*, Opposition to Emergency Motion, Ex. E.) In the course of respondent's candidacy, he appeared before the Governing Board on several occasions on matters pertaining to the election. (Supplemental Declaration of Dr. Thomas Davies in Opposition to Defendants' Order to Show Cause Re: Contempt.) On each occasion, respondent publicly identified himself as a candidate, and the President of the Governing Board publicly recognized Dr. Davies' candidacy. *Ibid.* At no time did any board member protest. *Ibid.* To the contrary, the only communication from petitioner to respondent was a mailing sent to all candidates welcoming their participation in the political process. (Emergency Motion, Ex. 8, ¶ 4.)

Respondent was elected to the Governing Board on November 6, 1990, finishing first among the six candidates.[2] After the election, when two of the incumbent board members had lost to Dr. Davies, and before the new board members took office, the old members of the Governing Board (including the two members who had just lost their seats in the election) directed the school district's attorneys to bring a motion in the district court invoking paragraph 9 of the settlement agreement. Petitioner accused Dr. Davies of being in contempt of court for his alleged violation of the April 1989 "dismissal order." *Ibid.*

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[2] The election filled three seats on the Governing Board. (Emergency Motion, Ex. 8, ¶¶ 6-8.) All six candidates were listed on a single ballot. *Ibid.* A voter could vote for any three, with the top three vote-getters taking office. Dr. Davies finished first. *Ibid.* One incumbent finished third and the other two incumbents on the ballot finished fifth and sixth. *Ibid.*

The district court granted petitioner's motion, thereby disenfranchising the 56,133 voters who had voted for Dr. Davies. (Petition, Appendix C.) In addition to ordering Dr. Davies to resign his office immediately, the district court ordered Dr. Davies to pay petitioner's attorneys' fees of more than $25,000. *Ibid.* In reaching its ruling, the district court apparently made little if any attempt to determine whether enforcement of paragraph 9 harmed important public interests or constitutionally protected political rights. *Ibid.*

Respondent appealed the contempt order to the Ninth Circuit Court of Appeals. (Emergency Motion, Ex. 1.) The Ninth Circuit vacated the district court's contempt order and declared respondent's prior resignation from the school board to be of no force or effect. (Petition Appendix, at B-2.) The Ninth Circuit also vacated the trial court's order that respondent pay petitioner's attorneys' fees.[3] *Ibid.* As a result of the Ninth Circuit's decision, respondent has resumed his rightful position on the school district's Governing Board, and has assumed all responsibilities attendant to that position.[4]

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[3] The Ninth Circuit recognized but did not decide the questions of whether the terms of paragraph 9 were incorporated into the district court's dismissal order and whether the district court had jurisdiction over Dr. Davies after his claim was remanded to state court. (Petition Appendix, at A-6, A-8 fn. 3.)

[4] For a more detailed description of the procedural history, see the Ninth Circuit's discussion at pages A-7 to A-8 of the Petition Appendix.

REASONS FOR DENYING THE PETITION

I

THE PETITION FOR WRIT OF CERTIORARI FAILS TO MEET THE SUPREME COURT RULE 10 STANDARD OF PRESENTING SPECIAL OR IMPORTANT REASONS FOR REVIEW ON WRIT OF CERTIORARI

The Petition for Writ of Certiorari does not meet the standard of Supreme Court Rule 10. The rule provides, in pertinent part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

Rule 10 lists several reasons that might satisfy this high standard. The school district does not even arguably fit within any reason except the provision of subsection 10(c), which provides that review may be proper when "a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court. . . . "

Yet here, although the Ninth Circuit decided a matter of constitutional import, the court did not depart from established legal precedent. There is an important constitutional right to candidacy. *See, e.g., Morial* v. *Judiciary Comm'n of the State of Louisiana*, 565 F.2d 295, 301 (5th Cir. 1977), *cert den.*, 435 U.S. 1013 (1978); *Stone* v. *City of Wichita Falls*, 477 F.Supp. 581, 584-85 (N.D. Tex. 1979), *aff'd.*, 646 F.2d 1085 (5th Cir. 1981), *cert den.*, 454 U.S. 1082. That right is intertwined with the general citizenry's right to vote. *See, e.g., Johnson* v. *Hamilton*, 15 Cal.3d 461, 471, 125 Cal.Rptr. 129, 541 P.2d 881 (1975). While an individual can waive most of his/her individual constitutional

rights upon a showing by clear and compelling evidence of a knowing and intentional waiver (*see, e.g., Sambo's Restaurants, Inc.* v. *City of Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981), *cert den.*, 454 U.S. 825), a clause of a contract purportedly waiving individual constitutional rights is void if, on balance, enforcement significantly harms important public interests. *See Town of Newton* v. *Rumery*, 480 U.S. 386, 392-97, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987); *Driessen* v. *Freborg*, 431 F.Supp. 1191, 1196 (D. N.D. 1977).

Here, the school district does not contend that the Court of Appeals failed to apply these legal standards or to balance the competing interests. Rather, the school district challenges the wisdom of the outcome.[5] The school district is dissatisfied with the Ninth Circuit's conclusion that on the facts of this particular case, the harm to the public interest is too great to allow enforcement of paragraph 9 of the settlement agreement. In other words, while the Ninth Circuit's decision is an important reaffirmation of fundamental democratic principles, it does not create new law or diverge from existing law. Therefore, the petitioner fails to satisfy Rule 10 because the Ninth Circuit's decision does not decide questions of federal law which have not been, but should be, settled by this Court.

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[5] During oral argument to the Ninth Circuit, the school district seemed opposed to the application of any balancing test. The school district's petition, however, seems to now recognize that sometimes the parties' interest in enforcement of contract provisions can be outweighed by other public interests.

II

THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES.

A. The Petitioner Mischaracterizes the Rule of Law Applied By the Court of Appeals.

Petitioner has inaccurately characterized the Ninth Circuit's holding. Petitioner casts the first question presented for review as "whether an individual may waive his or her right to seek and hold elective office on a specific local public school board, or whether such a waiver is void under all circumstances as against public policy." (Petition, p. "i".) Petitioner's use of the words "under all circumstances" wrongly suggests that the court below applied a per se rule in holding unenforceable the challenged provision. In fact, the Ninth Circuit expressly rejected a per se rule, and applied the balancing test set forth in *Town of Newton* v. *Rumery*, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987) ("*Rumery*"). (Petition Appendix, at A-15 to A-19.) The Court of Appeals found the challenged provision unenforceable only after it carefully weighed the public interests for and against the enforcement of the particular challenged provision before it. (Petition Appendix, at A-18 to A-25.) Petitioner's suggestion that the Court of Appeals held such waivers "void under all circumstances" is misleading.

B. The Court Below Correctly Applied the *Rumery* Balancing Test.

1. A Balancing Test Is Appropriate To Determine If This Settlement Clause Is Void As Against Public Policy.

An agreement to settle a legal dispute is a contract, and its enforceability is governed by principles of

contract law. *See, e.g., United States* v. *ITT Continental Baking Co.* 420 U.S. 223, 238, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975); *Village of Kaktovik* v. *Watt*, 689 F.2d 222, 230 (D.C. Cir. 1982). It is hornbook law that private parties cannot agree to provisions of a contract that violate public policy. *See, e.g., Northwest Airlines, Inc.* v. *Alaska Airlines, Inc.*, 351 F.2d 253, 256 (9th Cir. 1965), *cert den.*, 383 U.S. 936 (1966). Yet here, the settlement contract on its face does just that. Thus, as this Court recognized in *Rumery*, a careful balancing test is necessary to evaluate settlement agreements that implicate public interests.[6] *Rumery*, 480 U.S. at 392-97.

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[6] The Court of Appeals wrestled with the issue of whether the *Rumery* balancing test, which only dealt with an agreement waiving a statutory right (*Rumery*, 480 U.S. at 392), is the appropriate test in a case where a contract purports to waive constitutional rights. (Petition Appendix, at A-17 to A-18.) The court found it did not need to decide that issue because the challenged provision is unenforceable even under the *Rumery* balancing test. *Ibid.*

If the Court of Appeals had addressed this issue, it might well have concluded that *Rumery* did not control. In *Rumery*, an individual waived his right to seek monetary damages for an alleged wrong by signing a "release-dismissal agreement." The agreement did not go beyond dismissal of the potential claims. For example, it did not purport to prevent the individual from running for mayor or chief of police of the city whose police force had allegedly violated his rights. Here, in contrast, by restricting respondent's right to candidacy, the challenged provision went far beyond a waiver of potential claims, and far beyond any legitimate government interest. For example, enforcing the challenged provision would not enable petitioner to better fulfill its educational function. Although the individual Governing Board members may disagree, the voters of the

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2. The Court of Appeals Properly Evaluated the Public Policies Against Enforcement.

The public policies that weigh against enforcing paragraph 9 are substantial. Although there are no known cases directly on point, there is significant authority for the proposition that contracts which tend to impair the integrity of public elections are void. As one author states:

> Agreements which tend to impair the integrity of public elections are contrary to public policy. The law, therefore, condemns as illegal, not only agreements to bribe a voter directly or indirectly, but also, all those which in any way tend to curtail a free exercise of the elective franchise, as, for example, a contract for a reward, contingent on success, to use one's influence to secure another's election to public office; . . .
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> * * *
>
> It is to the interest of the state that all places of public trust be filled by men of capacity and integrity, and that the appointing power should be shielded from influences which may prevent the best selection; hence, the law annuls every contract for procuring the appointment or election of any person to an office, or for procuring his resignation from an office. All contracts tending to influence appointments to public offices

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school district obviously believed respondent could *improve* the school district's performance of its educational function. Thus, due to the constitutional nature of the interests involved, the Ninth Circuit would have been justified in applying a more stringent test to enforce this contract clause than was applied to the contract clause in *Rumery*.

> are unlawful and void, and this is the rule even though the promised payment therefor is not contingent on success.

17 C.J.S. §§ 217-218, pp. 1045-1047. Likewise, this Court has recognized that:

> No right is more precious in a free country than that of having a voice in the election of those who make laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Williams v. *Rhodes*, 393 U.S. 23, 31, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).[7] Stated succinctly, *any* restriction on the right to vote freely for the candidate of one's choice strikes at the heart of representative government. *Reynolds* v. *Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).[8]

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[7] *See also*, section 29612 of the California Election Code:

> Any person who in any manner interferes with . . . the voters lawfully exercising their rights of voting at an election, as to prevent the election . . . from being fairly held and lawfully conducted is punishable by imprisonment in the state prison for 16 months or two or three years.

[8] *See also, Johnson* v. *Hamilton*, 15 Cal.3d 461, 471, 125 Cal.Rptr. 129, 541 P.2d 881 (1975):

> One disturbing phenomenon of the current political scene . . . is an apparent substantial increase in voter apathy. The erosion and decay caused by the acid of indifference, unconcern and lack of participation, if prolonged, may pose a danger to democratic institutions, far more subtle and invidious than any other. Such a danger suggests the wisdom of widening rather than narrowing the candidate options available to the public. The vigor of a democracy depends

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The Court of Appeals recognized the district court's error in treating Dr. Davies' constitutional right to hold public office as an ordinary chattel, one which could be bought or sold. The district court had stated: "In essence, Dr. Davies sold his constitutional right to the District for his share of $39,200, and is precluded from asserting it now."[9] (Interim Motion, exh. 7, p. 2, ll. 24-26.) This holding was clearly erroneous. There is no authority for the proposition that a person's right to hold public office can be bought or sold. It would indeed be ironic if, under the republican form of government, representatives could use tax revenues to pay off political opposition and thereby legally block the electorate from choosing its own candidate. As the Court of Appeals held in reversing the district court, "[t]o treat political rights as economic commodities corrupts the political process. . . . such agreements are particularly offensive where, as here, the

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> upon the continued infusion into the stream of public debate of the views and proposals of the many. These views and the political fortunes of those who as candidates for public office advance them will be accepted or rejected by the people whose common sense and good judgment may, indeed must, be trusted. For in the final analysis it is the people's business with which we are concerned.

[9] The district court apparently accepted petitioner's argument that it paid Dr. Davies not to run for office. According to the school district, one of the important terms of the settlement agreement was Dr. Davies' consent to forego seeking "office" with the school district, for which Dr. Davies (and his wife) "received the sum of $39,200 in exchange. . . . " (Petition, pp. 3-4.) The school district offers no explanation of why it insisted on a settlement agreement that *ipso facto* is a crime under California law. *See* Elec. C. § 29305 and Penal C. § 424.

parties authorizing the payment are elected officials and the recipient is a potential political opponent." (Petition Appendix, at A-22.)

This issue, the nature of the American form of government, illustrates the broader concerns that are impacted if private contracts can restrict the right to candidacy. A school district is a group of citizens who pool their resources to hire teachers and administrators to educate their children. To oversee this operation, the citizens elect from among themselves representatives who act as a school board. Thus, the school board is simply the voice of its collective citizenry – a way to avoid a plebiscite on every administrative question. Even if one assumes that the settlement agreement at issue here was properly signed on behalf of the citizens of the school district, the citizens withdrew any possible restriction by their votes for Dr. Davies in the election. Here, there was a plebiscite and Dr. Davies won. That is the essence of democracy.

The Court of Appeals recognized this, holding that the challenged provision called into question the constitutional right to run for elective office and the constitutional rights of the voters. The Court of Appeals had no difficulty in identifying these public interests as interests "of the highest order served by the preservation of the integrity of the ballot." (Petitioner's Appendix, at A-18.) Indeed, the importance of the public interest is aptly declared by section 29305 of the California Election Code, which states, in pertinent part, "A person shall not directly or through any other person advance, pay, solicit, or receive or cause to be paid or received any money or other valuable consideration . . . in order to induce a

person not to become or to withdraw as a candidate for public office."

Petitioner improperly tries to minimize these public interests by arguing that the challenged provision is enforceable because it does not involve a "general disqualification" from candidacy, and that it "applies only to one office." (Petition, p.16.) Petitioner suggests that the Court, respondent, and the voting public should be satisfied as long as respondent can run for some *other* office, in some *other* district, or as long as someone other than respondent, but with respondent's political and educational views, can be elected. This reasoning exposes petitioner's real motive behind its district court contempt action: The individual Governing Board members do not want respondent to serve on the Governing Board, and they believe they should have the right to substitute their judgment for the will of the voters.[10] The Court of Appeals recognized this motive, and properly characterized it as "pernicious." (Petition Appendix, at A-21.)

Petitioner also argues that the challenged provision is enforceable because it does not "place any burdens on any classification of persons." (Petition, p. 16.) In fact, the discriminatory classification here is of the most obvious and direct variety: It purports to single out and exclude a particular potential candidate from running for political office and it precludes the voters from electing him simply because he was once a party to a lawsuit involving petitioner.

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[10] This paternalistic model of government that the Governing Board implicitly promotes is often an indicia of societies less democratic than our own.

Finally, petitioner tries to avoid the real issue by noting that this Court has never recognized candidacy as a "fundamental right." That much is true. This Court has upheld numerous statutes and regulations that, to one degree or another, affect the ability of a given individual to run for office. (See cases cited at Petition Appendix, at A-18 to A-19.) However, as the Court of Appeals recognized, such statutes and regulations are ordinarily grounded in the state's important interest in holding fair, open and procedurally proper elections, a fundamental tenet of the democratic system. *Ibid*. Here, petitioner does not even suggest that the challenged provision is necessary to protect the state's interest in governing the mechanics of an election. Rather, the motive behind the provision appears either to be to insulate the incumbent Governing Board members from potential political competition or to "protect" the electorate from someone who has different political views than the current members of the Governing Board.

3. The Court of Appeals Properly Evaluated The Public Policies Favoring Enforcement.

Given the strong public policies involved, it was the school district's burden to identify countervailing public policies to justify enforcement of the challenged provision. Although the school district now focuses on a variety of public policy arguments, the school district placed much less significance on these issues below. The school district essentially argued to the district court that "a contract is a contract," and that should end the discussion. The school district maintained this posture on appeal. Thus, the record is devoid of any school district

brief or other pleading discussing at any length the public policies supposedly served by enforcing the challenged provision.

In oral argument before the Ninth Circuit, the school district remained unable or unwilling to enunciate what important public interest was promoted by forever barring a particular person from being a member of the school board (and concurrently forbidding voters from electing the representative of their choice). The oral argument transcript reveals that the court repeatedly asked the school district's counsel to address this question, but the school district offered little in response.

Now, in an ironic twist, the school district accuses the Ninth Circuit of "paying mere lip service" to relevant cases, of "ignoring" important public policies, of "not appreciating" important facts, and of making "sinister" assumptions. (Petition, pp. 9, 13, 15.) These strident attacks on the appellate court are unfair. Giving petitioner every benefit of the doubt, it at most urged two public policy considerations as the grounds to enforce the limitation on respondent's right to candidacy. First, petitioner argued that the general public policy favoring enforcement of private agreements and encouraging the settling of litigation justified enforcing paragraph 9 of the settlement agreement. (Petition Appendix, at A-20.) The Court of Appeals considered this interest, but found it insufficient to overcome the substantial public interests weighing against enforcement. As the court correctly noted, the interest in encouraging settlement is present in every case in which the validity of a settlement agreement is in question; there would be no point to the *Rumery* balancing test (or any other test) if all settlement

agreement provisions were blindly enforced. (Petition Appendix, at A-20.)

Petitioner's second asserted public policy interest urged in the court below was that its constituents would be harmed by respondent's participation in the operation of the school district. (Petition Appendix, at A-21.) The Court of Appeals properly rejected this assertion, noting that the voters are the best judges of their own interests. (Petition Appendix, at A-21 to A-22.) The court refused to allow the Governing Board members, or the outgoing incumbents, to substitute their judgment in the place of the voters' collective judgments, as expressed in the election results.[11] *Ibid.*

In its petition to this Honorable Court, petitioner raises for the first time the asserted public policy favoring settlement of litigation against public agencies.[12] Petitioner claims that although the Court of Appeals considered the public policy favoring settlement, the court nonetheless failed to recognize "the critical importance of

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[11] Ultimately, the course of events since the Ninth Circuit's decision seem to belie the school district's concerns. Dr. Davies took his seat on the Governing Board in February 1991. He has been part of weekly meetings since that time, and the school district appears to be functioning without incident.

[12] The petitioner asserts that the reason why there is a heightened public interest in settlements when the settling party is a public entity is that this avoids the inefficient dedication of public resources to protracted litigation. This argument is paradoxical in light of the apparently gross expenditures by this school district, which claims to be virtually bankrupt, in its seemingly obsessive preoccupation with keeping Dr. Davies off of the Governing Board.

settlement . . . [of] litigation against a public agency." (Petition, p. 10.) This argument is a red herring, whether stated as a general proposition applicable to all litigation or limited to litigation involving public agencies. The fact is, the settlement agreement between petitioner and respondent *did* settle all litigation between them, and that litigation will remain settled regardless of the outcome of this petition. In short, the settlement agreement has already accomplished the very goal which petitioner now asserts as the basis for precluding respondent from being a candidate for office.

Further, the elimination of portions of paragraph 9 from the settlement agreement has not in any way weakened other terms of the settlement.[13] The settlement agreement provided that if any term of the settlement agreement was found invalid or unenforceable, the unenforceable term would not impact any other terms of the settlement agreement. (Emergency Motion, Ex. 3, ¶ 18.) Thus, even with the elimination of the provision restricting Dr. Davies' right to candidacy, the other provisions of the settlement agreement have remained in force.[14]

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[13] The Ninth Circuit did not strike the entirety of paragraph 9 of the settlement agreement. The court only held that paragraph 9 was void to the extent that it restricted the right to seek and hold elective office. The Ninth Circuit did not in any way void the remainder of paragraph 9.

[14] The school district is presumably not arguing that the Court should enforce paragraph 9 of the settlement agreement, regardless of its effect, because to do otherwise would generically dissuade settlement of litigation. It would make little sense to argue that a court would be bound to foster settlements to the point of enforcing a contract that offends the Constitution.

Petitioner now also raises the public interest in encouraging obedience to court orders. (Petition, p. 9.) Petitioner's argument begs the essential question – whether there was any court order involved here. The provision restricting respondent's right to candidacy was contained in a document entitled "Stipulation for Compromise Settlement, Release and Order Thereon." The "Dismissal and Release and Order Thereon" acknowledged the fact of settlement and the release, and directed that the dismissal and release be entered in the official docket, but did not incorporate or order enforcement of the terms of the settlement. There is a split among the Courts of Appeals whether, in these circumstances, a breach of the settlement agreement constitutes a violation of a court order. *See generally, Hinsdale* v. *Farmers Nat'l. Bk. & Trust Co.*, 823 F.2d 993, 996 (6th Cir. 1987); *Fox* v. *Consolidated Rail Corp.*, 739 F.2d 929, 932 (3rd Cir. 1984), *cert den.*, 469 U.S. 1190 (1985). The Ninth Circuit apparently has yet to rule on this issue. Thus, petitioner misses the undecided legal issue when the petitioner assumes that there was a "court order" directing respondent not to run for office.[15]

Further, even if one assumes that Dr. Davies did violate a court order, petitioner's argument remains

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[15] Unlike petitioner, the Court of Appeals did not miss the legal issue of whether the dismissal order could form the basis for a judgment of contempt in view of the fact that the order did not direct the parties to abide by the agreement. However, based on its conclusion that the challenged provision of the settlement agreement was unenforceable in any event, the Court of Appeals found it unnecessary to decide this issue. (Petition Appendix, at A-9.)

unpersuasive. There is no evidence that Dr. Davies intentionally flaunted a court order. At most, he interpreted a single provision of a settlement agreement differently than the district court did. More importantly, the focus of the Ninth Circuit decision is not what Dr. Davies knew and intended, but rather on how the enforcement of paragraph 9 of the settlement agreement strips the electorate of its constitutional rights. Enforcement of paragraph 9 affects tens of thousands of people, not just Dr. and Mrs. Davies. 56,133 people voted for Dr. Davies. The court's order abridges their constitutional rights. Therefore, unlike in *Rumery*, the general citizenry loses substantial rights if the challenged provision is enforced.

As this entire discussion illustrates, petitioner's only real complaint with the Ninth Circuit is that petitioner did not prevail. Petitioner does not challenge the rules of law the Court of Appeals applied. Petitioner merely dislikes the result. Therefore, Petitioner shows no basis for this court to review the Court of Appeals' decision.[16]

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[16] The school district's petition for writ of certiorari strongly suggests that if this Court disagrees with the Court of Appeals' application of the *Rumery* balancing test, then this Court should affirm the district court's decision. This suggestion inaccurately assumes that the school district prevailed on all other issues. The Court of Appeals gave serious consideration to many of Dr. Davies' other legal arguments, including the argument that the school district either waived, or was estopped from asserting, the provisions of paragraph 9 of the settlement agreement. The Court of Appeals did *not* reject this argument, but rather held that:

(Continued on following page)

CONCLUSION

Petitioner's arguments show that the true disagreement between petitioner and respondent is a political one, which the voters have resolved. The Ninth Circuit's opinion upheld the right to candidacy and the right to vote, which outweighed any opposing public interests. Petitioner continues to pursue what is apparently a vendetta, but nonetheless has shown no reason why this

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> "[I]t is apparent that both the waiver inquiry and the estoppel inquiry require 'factually intensive' showings by Dr. Davies. Because the urgency of the motion in the court below, . . . the District Court neither conducted a hearing nor made factual findings with respect to either waiver or estoppel. As a result, we are unable to conclude on the basis of the current record that the District waived its right to enforce the agreement or that the District should be estopped. As a practical matter, the urgency of this appeal foreclosed the possibility of remanding the proceedings to the District Court for the development of a more complete factual record. Because we hold below that the challenged provision of the settlement agreement is unenforceable as against public policy, Dr. Davies is entitled to the relief he seeks regardless of whether he could have ultimately prevailed on a defense of waiver or estoppel. Thus a remand would in any event have served no purpose.

(Petition Appendix, at A-14 to A-15.) (citations omitted) As this portion of the Court of Appeals' decision reveals, if this Court disagrees with the Court of Appeals' application of *Rumery*, that would still leave open other persuasive reasons for affirming the Ninth Circuit's decision, or remanding this matter for further factual determinations.

Court should reach a different result than the Ninth Circuit. Therefore, the petition should be denied and the Court should award respondent all allowable attorneys' fees and costs.

Respectfully submitted,

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